

Case No. 7,121.
[2 Ben. 353.]¹

THE JACK JEWETT.

District Court, S. D. New York.

April, 1868.

POSSESSORY ACTION—DISCONTINUANCE—DELIVERY OF PROPERTY BY THE MARSHAL.

Where a possessory libel was filed by one B., claiming to be the owner of a propeller, and that she had been taken from him by H. and others, and process was issued against the propeller, and against such persons, under which process the marshal, on March 2d, 1868, took possession of the vessel, taking her by force from the representative of H. and the others, who claimed to hold her by bills of sale and mortgages, and, on March 10th, no appearance having been entered in the cause, the libellant discontinued the suit, and the clerk of the court

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notified the marshal to discharge the vessel from custody, whereupon the marshal withdrew from the vessel, and B., who had been allowed by the marshal to come on board the vessel, took possession of her, and took her out of the district, and thereafter H. and the others presented a petition to the court praying that the marshal might be directed to restore the vessel to the petitioners, from whom he had taken her: Hew, that, the suit having been discontinued, the court had no longer any possession of the vessel, or jurisdiction of the suit, or power to grant the relief prayed for.

[Cited in *Bolten v. The James D. Pendergast*, 30 Fed. 720.]

The libel in this case was filed on the 2d of March, 1868. The action was one for the possession of the propeller Jack Jewett, the libellant John M. Burt, claiming to be her owner. The libel set forth that Willet P. Roe, George W. Holman, and Frederick Thompson, with other persons, had deprived the libellant forcibly of the possession of the vessel, and prayed process against the vessel, and that Holman, Thompson, and Roe, and all persons intervening for their interest therein, might be cited to appear and answer the libel, and that the vessel might be delivered to the libellant, and that Holman, Thompson, and Roe, might be condemned to pay the libellant his damages and costs in the premises. On this libel process was issued from this court, on the 2d of March, 1868, as prayed for, returnable on the 24th of March, 1868. When the deputy marshal went to the vessel to execute the process, he found her at the Atlantic Basin, in Brooklyn, in possession of one Strauss, a general deputy of the sheriff of Kings county, who claimed to hold her on behalf of the said Holman, Thompson, and Roe, and of Stephen F. Shortland, Mary Newcomb, Benjamin G. Richardson, and David Waugh, under sundry bills of sale and mortgages. Strauss resisted the deputy marshal, and refused to yield possession of the vessel to him, or to an extra force which the marshal sent to reduce the vessel to custody. Thereupon the marshal obtained a file of marines from the navy yard, and by their aid took possession of the vessel, and removed her from the Atlantic Basin. He detained her in his custody until the 10th day of March, 1868, when the libellant discontinued his suit, and the usual notice was served by the clerk of the court on the marshal, notifying him that the suit had been discontinued and that the costs of the clerk and marshal had been paid, and directing him to discharge the vessel from his custody as to the suit. Thereupon the deputy marshal withdrew from the vessel, and Burt, the libellant, being in possession of her by agents of his whom the deputy marshal had suffered to go on board of her, took her away from the port of New York. There was no claim filed, nor any appearance entered in the suit, The parties for whom Strauss acted now presented a petition to the court, praying that the marshal might be directed to deliver the vessel to the petitioners, from whom she was taken by him under said process.

T. C. T. Buckley and J. K. Hill, for petitioners.

T. Scudder, for the marshal.

BLATCHFORD, District Judge. The difficulty in the way of granting to the petitioners the relief asked is, that the suit is discontinued. The vessel has been released from

custody. The marshal was authorized to release her. The only complaint is that he gave her up to the wrong person. The court has no longer any possession of the vessel, or any jurisdiction of the suit, either in rem against the vessel, or in personam against such of the petitioners as were parties to it, and has no power to give the relief asked. The marshal has not disobeyed any process or order of court, or been guilty of any contempt of court for which he can be attached, and that is not the relief asked. If the marshal, while the vessel was in his custody, suffered her to be injured, or has been guilty of a breach of duty in permitting the libellant to take possession of her, and in not delivering her back to the custody of those from whose possession he took her, the parties aggrieved have their remedy against him by a proper action in the proper tribunal. This court cannot administer the relief asked in this summary way on this petition. This suit having been discontinued on the 10th of March, 1868, and the vessel discharged from the custody of the marshal by the order of this court, without any special direction to the marshal as to the person to whom he was to deliver the vessel, there is not, even if the marshal was guilty of a breach of duty in delivering her to the libellant, such an irregularity, or mistake, or fraud, as would warrant the court in retaking possession of the vessel, even if it could do so in any case where the suit was regularly discontinued. By the discontinuance of the suit, the lien on the vessel is gone, and for the court now to order the marshal to seize her, when there is no suit pending, and no jurisdiction in the court over any thing or any person in the premises, would seem to be to order the marshal to commit a naked trespass, in respect to which the order of this court would be no protection to him if he were sued therefor. The principle which the circuit court for this district laid down in the cases of *The Union* [Case No. 14,346] and *The White Squall* [Id. 17,570], as applicable to the case of a discharge of a vessel on a stipulation for value in a suit in rem, that the court has no power to order back, into the custody of the marshal, a vessel which has, on a stipulation, been fairly discharged from arrest, applies, a fortiori, to a case where she has been properly discharged by the termination of the suit.

The prayer of the petition is denied.

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